

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

9	UNITED STATES OF AMERICA,)	No. CV-F-05-285 REC/DLB
10)	
11	Petitioner,)	ORDER FINDING RESPONDENT TO
12	vs.)	BE IN CIVIL CONTEMPT OF
13	LORNE McCAN,)	COURT, DIRECTING ISSUANCE OF
14)	BENCH WARRANT FOR
15	Respondent.)	RESPONDENT'S ARREST BY THE
16)	UNITED STATES MARSHAL
		_____	SERVICE, DIRECTING UNITED
			STATES MARSHAL TO BRING
			RESPONDENT BEFORE THE COURT,
			ORDERING RESPONDENT CONFINED
			IN THE FRESNO COUNTY JAIL,
			AND ORDERING RESPONDENT TO
			PAY COMPENSATORY FINE TO THE
			UNITED STATES

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Respondent Lorne McCAN was ordered to appear on August 22,
2005 at 1:30 p.m. and show cause why he should not be found in
civil contempt of court.

No appearance by or on behalf of respondent was made. Upon
due consideration of the record in this action and for the
reasons set forth herein, the court finds respondent Lorne McCAN

1 to be in civil contempt of court and issues the sanctions set
2 forth herein.

3 **1. Background.**

4 The United States Magistrate Judge filed on May 10, 2005 a
5 recommendation that the IRS summons issued against the respondent
6 be enforced and that respondent be ordered to appear at a hearing
7 for the purpose of complying with the summons, during which
8 hearing the validity of any claim of the privilege against self-
9 incrimination to questions posed to the respondent or to
10 documents subject to summons also may be determined.

11 On May 19, 2005, respondent filed a "Notice of Appeal of
12 Magistrates Findigs [sic] and Recmmendations [sic] Re: Tax
13 Summons Enforcement, and Order re: Privilege Logs."

14 By Order filed on May 24, 2005 (hereinafter referred to as
15 the May 24 Order or the Summons Enforcement Order), the court
16 deemed respondent's notices of appeal filed on May 19, 2005 to be
17 objections to the Magistrate Judge's recommendation pursuant to
18 Rule 72-303(b), Local Rules of Practice. The May 24 Order
19 enforced the IRS summons and ordered respondent to appear on June
20 17, 2005 at 8:00 a.m. in Courtroom 5

21 there to be sworn, to give testimony, and to
22 produce for examining and copying the books,
23 checks, records, papers and other data
24 demanded by the summons. The examination
25 shall continue in the same place on July 11,
26 2005, at a time to be set in writing by
Revenue Agent Chynoweth or his designee. At
the hearing before Magistrate Judge Beck, any
issues regarding the Fifth Amendment
privilege against self-incrimination will be
ruled on by Magistrate Judge Beck and the

1 hearing will proceed.

2 Respondent then filed a pleading captioned "Notice of
3 Acceptance as True, Returning as True and Firing in Response to
4 United States District Judge's Order Dated May 23, 2005 and In
5 Support of Appeal of United States District Judge's Order Dated
6 May 23, 2005" wherein it is stated in pertinent part:

7 By special appearance, only and not intended
8 to constitute an express nor implied waiver
of any and all Rights, privileges or
otherwise that may exist.

9 Secure party also referred to as general
10 trustee for [named respondent], notifies the
court for purposes of closure and settlement
11 of the account that the 'Order Deeming
12 Respondent's 'Notice of Appeal of Magistrates
Findings [sic] and Recommendations [sic]' To
Be Objections to Findings and Recommendation;
13 Enforcing IRS Summons and Directing
Respondent to Appear on Friday, June 17, 2005
14 at [specified time] in Courtroom 5' has been
accepted as true and returned as true and the
15 author has been fired, District Robert E.
Coyle.

16 This pleading is signed by respondent as "Secured party third
17 party intervenor for Lorne McCAN". Attached to this pleading is
18 a copy of the May 24 Order, which copy is stamped:¹

19 I received your offer of attached May 23,
20 2005. I am accepting your offer as true and
I am returning Your offer as true for closure
21 and discharge of this Matter. I am competent
to handle my own affairs. I am declaring you
22 incompetent.

23 You are fired.

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25 ¹Respondent filed a similar pleading with respect to the
Magistrate Judge's findings and recommendation that the IRS summons
26 be enforced.

1 Respondent also filed a pleading captioned:

2 Notice of Acceptance for Value and Returning
3 for Value the Order of United States District
4 Judge Robert E. Coyle Dated May 23, 2005
5 Pursuant To, But Not Limited To, HJR 192 And
In Support of Notice of Appeal of United
States District Judge's Order Dated May 23,
2005.

6 In these pleading, respondent, again acting as "general trustee"
7 asserts that the court's May 24, 2005 Order "has been accepted
8 for value and returned for value pursuant to but not limited to
9 HJR 192."

10 Thereafter, on June 13, 2005, respondent filed a pleading
11 captioned:

12 Notice of Appeal of the District Court's
13 Order Dated May 23, 2005. This Appeal is
Made to the Ninth Circuit Court of Appeals

14 The Notice of Appeal to the Ninth Circuit states that the issues
15 for appeal are:

16 1) Whether the District Court had
17 jurisdiction to issue the Order dated May 23,
2005, the entire record considered.

18 2) Whether the enforcement of the summons is
19 a violation of the Respondent/Appellants 5th
amendment privilege.

20 3) Whether the court can force the Authorized
21 Agent to testify on behalf of the respondent,
since the respondent is an artificial entity.

22 Respondent did not move this court for a stay of the Summons
23 Enforcement Order prior to filing the Notice of Appeal to the
24 Ninth Circuit. Respondent did not file a motion for a stay of
25 the Summons Enforcement Order until August 31, 2005.

26 On June 29, 2005, the United States filed a petition to find

1 respondent in civil contempt for his failure to comply with the
2 May 24 Order. Attached to this petition is a copy of a letter
3 dated June 14, 2005 addressed to respondent from Assistant United
4 States Attorney Himel, wherein it is stated in pertinent part:

5 As you know, Judge Coyle ordered you all to
6 appear, produce documents and testify in
7 Judge Beck's courtroom in the United States
8 Courthouse in Fresno on June 17, 2005. The
9 notices of appeal filed in your names have no
10 effect on your obligations to comply with
11 Judge Coyle's order in Fresno this Friday.

12 If you fail to comply, I can ask the United
13 States District Court to hold you in
14 contempt, have you arrested and brought to
15 Fresno, and not release you from custody
16 until you comply.

17 By copy hereof, I ask that Mr. Kaia inform
18 Ms. Liascos and Messrs. McCan and Innis of
19 this warning. Thank you for your attention
20 in this matter.

21 Also attached to the petition is the declaration of Revenue Agent
22 Fred Chynoweth, who avers in pertinent part:

23 4. At the scheduled times on June 17, 2005,
24 respondents failed to appear. Although I
25 called for [sic] respondents Innis and Booth
26 that day to ask whether they intended to
appear, they did not return my calls. They
neither appeared before me nor contacted me
at any time between the Orders and this
writing [executed on June 24, 2005], and in
particular they never said they were not
coming June 17.

27 5. The [Internal Revenue] Service keeps
28 records of employee time spent, by date and
29 case. As these records reflect, I spent 6
30 hours on these four cases on June 16, 2005,
31 and 10 hours on June 17, 2005, for a total
32 for those two days of 16 hours. My gross pay
33 is \$38.09 per hour; adding my employer-paid
34 benefits, my agency's total hourly personnel
35 cost for me is \$48.45. 16 hours times \$48.45

1 per hour is \$775.20 in personnel costs on
2 these cases for those days. A copy of my
3 travel voucher for travel to Fresno for these
4 cases on June 16-17, 2005 is attached ...; it
5 shows a total of \$123.94 in travel expenses
for the trip to Fresno to receive records and
testimony from these respondents. The sum of
\$775.20 in salary and benefits plus \$123.94
in travel expenses is \$899.14.

6. Respondents failure to comply with the
Order [sic] continues to the present.

7. The testimony and the books, records,
8 papers and other data demanded by the
9 summonses still are not in the possession of
the Internal Revenue Service.

10. The testimony and the books, records,
11 papers and other data demanded by the
12 summonses still are needed to determine the
13 correct tax liabilities of Mr. and Mrs.
14 Booth, Aligned Enterprises Trust and Alpha
Omega Trust for 1998 through 2002; and of San
Joaquin Wellness and Medical Group and
Bakersfield Properties and Trust Co. For 2001
and 2002.

15 Also attached to the petition is the declaration of Assistant
16 United States Attorney Himel, who avers in pertinent part:

17. This Court, by Orders filed May 23-25,
18 2005, directed respondents to appear in Judge
Beck's courtroom on June 17, 2005 ... The
19 reason the appearances were to be at Judge
Beck's courtroom was to have Judge Beck
available to decide any questions of
20 respondents' claims of the privilege against
self-incrimination. To give Judge Beck the
21 exact questions as to which the privilege was
claimed, the United States office retained a
22 court reporter to appear for all four
sessions.

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24 ...

25. At the scheduled times on June 17, 2005,
26 respondents failed to appear. After the
times for appearance by Mr. McCan and Ms.
Liascos passed without their appearing,

1 around 9:30 a.m., I called for [sic]
2 respondents Innis and Booth at their
3 workplace to ask whether they intended to
4 appear. They were said to be present but
5 busy. They did not return my calls. They
did not call me any time between the Orders
and this writing [executed on June 29, 2005],
and in particular they never said whether
they were coming June 17.

6 5. I keep records of my time spent on the
7 job. As these records reflect, I spent 7.25
hours on these four cases on June 16, 2005.
8 That time was spent preparing for the
respondents' appearances in Fresno, preparing
9 the case files for the trip, taking Amtrak
from Sacramento to Fresno, and meeting with
the IRS Revenue Agent.

10 6. I spent 7 hours on June 17, 2005. That
11 time was spent going from the hotel to the
federal courthouse, meeting with the IRS
12 Revenue Agent, telephoning the organization
where respondents Steven Booth and John Innis
13 work, awaiting respondents at Judge Beck's
courtroom, going from the federal courthouse
14 to the Amtrak station, waiting for the train,
and taking Amtrak from Fresno to Sacramento.
15 The total for these two days is 14.25 hours.

16 7. Under the calculation method prescribed
17 by my Department, to arrive at an hourly rate
18 for my work I take the sum of my gross pay of
\$66.06 per hour, benefits at 23% of gross
pay, or \$15.19 per hour, and Department
19 overhead of \$71.49 per hour. The total rate
is \$152.74 per hour. For tax cases, I.R.C. §
20 7430(c)(1)(B)(iii) limits attorney's fees to
a figure found in Rev.Proc. 2004-71, Section
21 3.35, namely \$150 per hour. The \$150 hourly
rate times 14.25 hours comes to \$2,137.50 as
22 the cost of my time spent on the cases for
the two days.

23 8. Additionally, a printout of my travel
24 voucher for travel to Fresno for these cases
on June 16-17, 2005 ... shows a total of
\$197.50 in travel expenses.

25 9. Additionally, a copy of the court
26 reporter's bill for \$200.00 in appearance

1 fees is attached ...

2 10. The sum of the \$2,137.50 for my time
3 plus the \$197.50 for my travel plus the
\$200.00 for the court reporter plus the
\$899.14 in the Declaration of Revenue Agent
4 Fred Chynoweth Re: Civil Content ... is
\$3,434.14.

5 On July 15, 2005, the court issued to respondent an Order to
6 Show Cause re Contempt. The Order to Show Cause orders
7 respondent to appear in Courtroom 1 on August 22, 2005 at 1:30
8 p.m. and show cause:

9 1. Why the respondents, JEAN ANNETTE
10 LIASCOS, LORNE McCAN, V. STEVEN BOOTH, LOUISE
11 Q. BOOTH, and JOHN INNIS, JR., should not be
12 held in civil contempt of this Court for
13 their failure to comply with the 'Orders
14 Deeming Respondent's "Notice of Appeal of
15 Magistrate's Findigs [sic] and Recmmendations
[sic]" to Be Objections to Findings and
Recommendation; Enforcing IRS Summons and
Directing Respondent to Appear on Friday,
June 17, 2005 at [times certain] in Courtroom
5' ('Summons Enforcement Orders').

16 2. Why the respondents should not be
17 incarcerated and order to pay a daily fine
18 until they comply with the Summons
Enforcement Orders, and ordered to pay a
compensatory fine to the United States.

19 IT IS FURTHER ORDERED that on or before
20 Monday, August 8, 2005 the respondents shall
21 file and serve a written response to the
'Petition Re: Civil Contempt of Orders filed
22 May 23-25, 2005.' Only those issues brought
into controversy by the responsive papers and
23 supported by declaration will be considered
at the hearing on this Order, and any
uncontested allegation in the Petition Re:
24 Civil Contempt will be considered admitted.

25 Respondents are hereby notified that a
failure to comply with this Order will
26 subject respondents to possible further
sanctions for contempt of Court.

1 Since the July 15, 2005 Order was served on respondent,
2 respondent has filed a pleading captioned "Notice of Returning
3 for Cause, Without Dishonor the Court's Order Dated July 15, 2005
4 Re: Contempt" and/or have returned the served copy of the July
5 15, 2005 Order marked "returned for cause without dishonor." In
6 addition, respondent filed a pleading captioned:

7 Notice of: Notice of Appeal Filed in Response
8 to the Court's Order Dated May 23-25, 2005.

9 Notice That This Court Lacks Jurisdiction To
10 Enforce Its Order Subsequent to Appeal in the
11 Ninth Circuit Court.

12 Notice That No Agreement Exists Between
13 Respondent & The Court Authorizing a Civil
14 Contempt & Respondent Does Not Agree To The
15 Terms of the Proposed Agreement Dated July
16 15, 2005 Called An Order.

17 In this pleading, respondent, signing as the "authorized agent",
18 asserts in pertinent part:

19 By special appearance, only and not intended
20 to constitute an neither [sic] express nor
21 implied waiver of any and all Rights,
22 privileges or otherwise that may exist.

23 Authorized agent for [name of specific
24 respondent], notifies the court for purposes
25 of closure and settlement of the account that
26 Notice Of: Notice of Appeal Filed in Response
To The Court's Order Dated May 23-25, 2005.

27 Notice That This Court Lacks Jurisdiction To
28 Enforce Its Order Subsequent to Appeal In The
29 Ninth Circuit Court.

30 Notice That No Agreement Exists Between
31 Respondent & The Court Authorizing A Civil
32 Contempt & Respondent Does Not Agree To The
33 Terms Of The Proposed Agreement Dated July
34 15, 2005 Called An Order has been filed for a
35 special appearance, which is scheduled for
36 August 22, 2005, in dept 1 of the Federal

Court house [sic], in Fresno, California

No other responses to the July 15, 2005 Order to Show Cause have been filed by respondent. As noted, respondent did not appear on August 22, 2005.

2. Merits of Order to Show Cause Re: Contempt.

a. Jurisdiction.

Respondent contends that this court lacks jurisdiction to enforce the Summons Enforcement Order by contempt because respondent filed an appeal to the Ninth Circuit.

Respondent's position is without merit. Absent a stay pending appeal, district courts have the authority to enforce their orders including holding parties in contempt while an appeal of the underlying enforcement order is pending. See Maness v. Meyers, 419 U.S. 449, 458-460 (1975); Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1480 (9th Cir. 1992); In Re Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1364 (9th Cir. 1987); 26 U.S.C. 7604(b). Here, because respondent did not apply for and obtain a stay of the Summons Enforcement Order pending the appeal, his failure to comply with the Summons Enforcement Order may be sanctioned by contempt.

b. Necessary Showing to Avoid Contempt.

If a person disobeys a specific and definite court order, he may properly be adjudged in contempt. Shuffler v. Heritage Bank, 720 F.3d 1141, 1146 (9th Cir. 1983). As explained in In re Crystal Palace Gambling Hall, Inc., supra, 817 F.2d at 1365: 'A person fails to act as ordered by the

1 court when he fails to take "all the
2 reasonable steps within [his] power to insure
3 compliance with the [court's] order []."' ...
4 It does not matter what the intent of the
5 appellants was when they disobeyed the
6 court's order ... Moreover, the contempt need
7 not be willful ... Even though 't]he sole
8 question is whether a party complied with the
9 district court's order,' a party can escape
10 contempt by demonstrating that he is unable
to comply ... Although both Crystal Palace
and the shareholders appealed, no stay was
obtained. A party cannot disobey a court
order and later argue that there were
'exceptional circumstances' for doing so.
This proposed 'good faith' exception to the
requirement of obedience to a court order has
no basis in law, and we reject the invitation
to create such an exception.

11 The party alleging civil contempt must demonstrate by clear and
12 convincing evidence that the parties to be held in contempt
13 violated the court's orders. See Federal Trade Comm'n v.
14 Affordable Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999). The
15 burden then shifts to the alleged contemnors to demonstrate why
16 they were unable to comply. A party's inability to comply with a
17 court's order constitutes a defense to a charge of civil
18 contempt. Id. The purpose of civil contempt is not to punish
19 but "to coerce the defendant into compliance with the court's
20 order, and to compensate the complainant for losses sustained."
21 Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 517 (9th Cir.
22 1992). While the court must use the "least possible power
23 adequate to the end proposed," Spallone v. United States, 493
24 U.S. 265, 276 (1990), it also "must consider the character and
25 magnitude of the harm threatened by continued contumacy, and the
26 probable effectiveness of any suggested sanction in bringing

1 about the result desired." Whittaker, id., 953 F.2d at 516.
2 However, footdragging is an important factor in weighing the use
3 of a contempt sanction. See Local 28 of the Sheet Metal Workers'
4 Int'l Ass'n v. EEOC, 478 U.S. 421 476-477 (1986).

5 Here, the record establishes that the United States has
6 demonstrated by clear and convincing evidence that respondent
7 violated the Summons Enforcement Order. Respondent did not
8 appear on June 17, 2005. As the court's docket in this case
9 demonstrates, respondent received a copy of the Summons
10 Enforcement Order because respondent filed a pleading stating
11 that the Order "has been accepted as true and returned as true
12 and the author has been fired, Judge Robert E. Coyle" and that
13 the respective respondent is "accepting your offer as true",
14 "returning Your offer as true for closure and discharge of this
15 Matter", that each respondent is competent, that Judge Coyle is
16 declared incompetent and that Judge Coyle is "fired". As the
17 docket in this case demonstrates, respondent received a copy of
18 the Order to Show Cause re: Contempt because respondent filed a
19 pleading returning the Order to Show Cause re: Contempt "for
20 cause without dishonor", and a pleading stating that this court
21 lacks jurisdiction to hold respondents in contempt because of the
22 appeals, and that no agreement exists between the respondents and
23 the court authorizing civil contempt. However, as ruled above,
24 because respondent did not seek and obtain a stay of the Summons
25 Enforcement Order pending the appeal, the fact of the appeal is
26 no defense to contempt for failure to comply with the Summons

1 Enforcement Order. Furthermore, respondent's contentions that
2 there must be an agreement between respondent and the court
3 before respondent can be found in contempt for his failure to
4 comply with the Summons Enforcement Order is frivolous. This
5 court has statutory and inherent authority to compel compliance
6 with its orders issued to parties appearing before it. Finally,
7 the only defense to the failure to comply with the Summons
8 Enforcement Order is that respondent was unable to comply. No
9 such showing has been made to this court.

10 Therefore, the United States has carried its burden of
11 establishing by clear and convincing evidence that respondent
12 Lorne McCan is in civil contempt of this court by her failure to
13 comply with the Summons Enforcement Order.

14 **c. Appropriate Sanction.**

15 The United States petitions the court to order coercive
16 confinement of respondent until respondent has complied with the
17 Summons Enforcement Order and to impose a compensatory fine of
18 \$686.00.²

19 **I. Coercive Confinement.**

20 18 U.S.C. § 1826 provides in pertinent part:

21 (a) Whenever a witness in any proceeding
22 before or ancillary to any court ... refuses
23 without just cause to comply with an order of
the court to testify or provide other
information, including any book, paper,

24
25 ²The amount sought to be imposed on respondent as a
compensatory fine represents respondent's one-fifth share of the
total expenses incurred by the United States and described in
26 detail supra.

1 document, record, recording or other
2 material, the court, upon such refusal, or
3 when such refusal is duly brought to its
4 attention, may summarily order his
5 confinement at a suitable place until such
time as the witness is willing to give such
testimony or provide such information. No
period of such confinement shall exceed the
life of -

6 (1) the court proceeding

7 ...

8 before which such refusal to comply with the
9 court order occurred, but in no event shall
such confinement exceed eighteen months.

10 (b) No person confined pursuant to subsection
11 (a) of this section shall be admitted to bail
12 pending the determination of an appeal taken
by him from the order for his confinement if
it appears that the appeal is frivolous or
taken for delay.

13 The court concludes from the record before it that coercive
14 confinement pursuant to Section 1826 is an appropriate sanction
15 to impose upon respondent for his failure to comply with the
16 Summons Enforcement Order. The record demonstrates that
17 respondent refuses to comply with orders of this court, including
18 refusing to appear at the Order to Show Cause hearing.
19 Respondent's refusals to comply with court orders are couched in
20 terms establishing respondent's disregard for the authority of
21 this court and evidences that his refusal to comply with the
22 Summons Enforcement Order is a deliberate decision on
23 respondent's part. The court is persuaded that the harsh
24 sanction of confinement is the only vehicle most likely to coerce
25 respondent into complying with the Summons Enforcement Order.
26

ii. Fines.

As noted, the United States also seeks a compensatory fine in the amount of \$686.00.

Sanctions for civil contempt may be imposed to coerce obedience to a court order, or to compensate the party pursuing the contempt action for injuries resulting from the contemptuous behavior or both. United States v. United Mine Workers, 300 U.S. 258, 303-304 (1947). Compensatory awards are limited "to actual losses sustained as a result of the contumacy." Shuffler v. Heritage Bank, supra, 720 F.2d at 1148.

The court concludes from its review of the declarations filed by the United States and the exhibits attached thereto that the amount requested by the United States represents the losses sustained by the United States as a result of respondent's contumacy. The court further concludes that the sanction imposed on respondent for his civil contempt in failing to comply with the Summons Enforcement Order will also include a monetary award to compensate the United States for respondent's one-fifth share of the losses sustained by AUSA Himel, Special Agent Chynoweth, and the United States in preparing to attend and attending the summons enforcement proceeding scheduled for respondent on June 17, 2005.

ACCORDINGLY:

1. Respondent Lorne McCan is found to be in civil contempt of this court by his failure to comply with the Summons Enforcement Order.

1 2. Respondent Lorne McCan shall stand committed to and
2 shall be confined in the Fresno County Jail until he purges
3 himself of contempt by complying with the Summons Enforcement
4 Order, the termination of the action, or eighteen months,
5 whichever is earlier, unless sooner discharged from such
6 confinement by due process of law.

7 3. A warrant of arrest shall now issue in due form for the
8 arrest of respondent Lorne McCan, directed to the United States
9 marshal for the United States District Court for the Eastern
10 District of California, Fresno Division, and that, when arrested
11 by the marshal, respondent Lorne McCan, be brought before the
12 Court for a further hearing to determine whether respondent Lorne
13 McCan has complied with the Summons Enforcement Order.

14 4. Respondent Lorne McCan shall be entitled to the services
15 of appointed counsel at any further proceedings in connection
16 with this civil contempt proceeding if he establishes that he is
17 indigent and, therefore, entitled to appointed counsel.

18 5. Respondent Lorne McCan shall pay a compensatory fine in
19 the amount of \$686.00 to the United States of America, to be paid
20 to the United States Attorney for the Eastern District of
21 California.

22 IT IS SO ORDERED.

23 **Dated: September 6, 2005**
24 668554

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